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THE CONSTITUTIONALITY OF THE FOOD CONTROL ACT

Section 4 of the Lever Act, or Food Control Act, of August 10, 1917,¹ rendered unlawful the sale of necessities at an unjust and unreasonable price. Congress failed to provide a penalty for this offense. Therefore the Circuit Court of Appeals held that charging an unreasonable price for sugar was no crime under Section 4, as federal courts have no jurisdiction in criminal cases except where the punishment is specifically provided for by an Act of Congress.² This is the traditional view as to the criminal jurisdiction of federal courts.³

The amendment to this Act, of October 22, 1919,⁴ provided that a fine not exceeding \$5,000 or imprisonment for two years, or both, be visited upon a violator of this section, excepting from the application of this statute, however, farmers, dairymen, and stockmen with respect to products raised on land owned or leased by them, and excepting collective bargaining of farmers and dairymen through their coöperative associations. In two decisions of federal district courts on the constitutionality of this section, as amended, it was held void in that it denies to the accused the information as to the nature and cause of the accusation, which is assured to him by the Sixth Amendment. It was said that a statute creating a crime should be sufficiently definite so that a man may know whether or not he is committing one without running the risk of a different interpretation on the part of a jury which tries him.⁵ But the majority of the courts in which this question has arisen have held the section to be sufficiently definite and it would seem that this is the preferable view.⁶ An extraordinary condition existed at the time of the passage of the Lever Act. Some curb was necessary upon the rapaciousness of the profiteer. Local conditions were too varied to permit of a set schedule of prices. The establishment of a maximum percentage of profit would have been too cumbersome and slow of enforcement. It was thought safe to leave this question to the jury. "The law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." These were the words of Justice Holmes in upholding the constitutionality of the criminal sections of the Sherman Anti-Trust Act in the case of *Nash v. United States*.⁷ In that decision the same objection was made as in the instant case; that the words, "unduly restrict competition," were so

¹ Comp. St. U. S. 1918, Comp. St. Ann. Supp. 1919, sec 3115 1/8 ff.

² *Mosseu v. United States* (1920, C. C. A. 2d) 266 Fed. 18.

³ *Tennessee v. Davis* (1879) 100 U. S. 257.

⁴ 41 Stat. at L., 297.

⁵ *Detroit Creamery Co. v. Kinnane* (1920, E. D. Mich.) 264 Fed. 845; *United States v. Cohen Grocery Co.* (1920, E. D. Mo.) 264 Fed. 218.

⁶ *United States v. Russell* (1920, E. D. La.) 265 Fed. 414; *United States v. Oglesby Grocery Co.* (1920, N. D. Ga.) 264 Fed. 691.

⁷ (1913) 229 U. S. 373, 377, 33 Sup. Ct. 780, 781.

indefinite as to constitute a violation of the Sixth Amendment. Those attacking this section of the Lever Act laid great stress on the case of *International Harvester Co. v. Kentucky*.⁸ But that was a case under a state statute making "any combination lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article." And this "real value" was to be its market value "under fair competition and under normal market conditions." The court held that this was compelling the corporation to guess what prices would be in an imaginary world and under penalty of an indictment, and held the law void. The opinion in the Harvester Co. case distinguishes the Nash case by saying, "that deals with the actual, not with an imaginary condition other than the facts." "The statute may be construed to forbid, in time of war, any departure from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer."⁹ Thus interpreted, it would seem that the Lever Act cannot be successfully attacked on the ground of indefiniteness.

Section 4 of the Lever Act has, however, been held unconstitutional as a violation of the Fifth Amendment, because it exempts from its operation farmers and others. In the case of *United States v. Armstrong*¹⁰ Judge Anderson of Indiana held that the "due process of law" clause was violated because of the arbitrary and unreasonable classification in exempting farmers and stockmen. These persons were favored in comparison with the producers of fuel, for example, whose product was of similar nature and quite as necessary to the conduct of the war. This presents an interesting problem on which we may shortly expect to see further litigation.¹¹

SOCIAL WELFARE

A field in which reliable social welfare statistics as to the effect of legal principles in actual operation would be of inestimable value in deciding what the law ought to be, is that of attorney's contingent fee contracts. The argument from necessity for such contracts is obvious: that otherwise poor suitors with deserving cases would find it impossible to get their cases into court. Hence the validity of such contracts

⁸ (1914) 234 U. S. 216, 34 Sup. Ct. 853.

⁹ *United States v. Oglesby Grocery Co.*, *supra*, note 6, at p. 695.

¹⁰ (1920, D. Ind.) 265 Fed. 683.

¹¹ The payment of a fine imposed in a criminal case, even if the judgment of conviction was void, is not a bar to a suit to recover the money. *United States v. Rothenstein* (1911, C. C. A. 7th) 187 Fed. 268. Under this rule a fine which had been paid to the government following a conviction under the original section was recovered in *Mossew v. United States*, *supra*, note 2.